A

PP

v.

MARWAN ISMAIL

B

HIGH COURT MALAYA, SHAH ALAM
KN SEGARA J
[CRIMINAL REVIEW NO: 43-18-2006]
8 DECEMBER 2006

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 - Section 39B(1) - Trafficking in dangerous drugs - Allegation of - Failure of magistrate to transmit case to High Court - Dangerous Drugs Act 1952, s. 41A - Fixing case for re-mention in magistrate's court - Whether justified - Detention at 'pleasure of prosecution' - Whether there was an abuse of*
D *the process of the law - Warrant of remand and mention date for accused to appear before magistrate again - Whether set aside - Whether magistrate directed to reconsider whether to transmit case - Criminal Procedure Code, s. 259 - Whether applicable - Criminal Procedure Code, ss. 29, 117, 323*

E ***CRIMINAL PROCEDURE:*** *Revision - Criminal Procedure Code, s. 323 - Trafficking in dangerous drugs - Allegation of - Failure of magistrate to transmit case to High Court - Dangerous Drugs Act 1952, s. 41A - Fixing case for re-mention in magistrate's court - Whether*
F *justified - Detention at 'pleasure of prosecution' - Whether there was an abuse of the process of the law - Warrant of remand and mention date for accused to appear before magistrate again - Whether set aside - Whether magistrate directed to reconsider whether to transmit case - Criminal Procedure Code, s. 259 - Whether applicable - Criminal*
G *Procedure Code, ss. 29, 117, 323*

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's court - Transmission of case to High Court - Failure of - Dangerous Drugs Act 1952, s. 41A - Fixing case for re-mention in magistrate's court - Whether justified - Detention at 'pleasure of prosecution' - Whether there*
H *was an abuse of the process of the law - Warrant of remand and mention date for accused to appear before magistrate again - Whether set aside - Whether magistrate directed to reconsider whether to transmit case - Criminal Procedure Code, s. 259 - Whether applicable - Criminal Procedure Code, ss. 29, 117, 323*

I

The record of proceedings before the magistrate on 30 November 2006 was called and examined, pursuant to s. 323 Criminal Procedure Code upon this court's attention being drawn to a

newspaper report dated 1 December 2006 regarding an offence of trafficking in dangerous drugs allegedly committed by the accused. When the accused was first produced before the magistrate, no plea was recorded by the magistrate in respect of the charge under s. 39B(1) Dangerous Drugs Act 1952 (DDA) for the alleged offence of trafficking in 1980 gm of ganja. However, the magistrate also did not transmit the case to the High Court and cause the accused person to appear or brought before the High Court as clearly provided for under s. 41A DDA. Instead, the magistrate fixed the case for mention again in the magistrate's court.

Held:

(1) Upon examining the original record of proceedings of the magistrate, the magistrate had hardly made any relevant record in clear terms to justify in law the re-mention of the case before her and thereby order the accused to be remanded in custody for a period of two months from his date of arrest. The record of proceedings did not show that there was any request from the DPP not to transmit the case to the High Court because the chemist report was not available. The magistrate appeared to have acted in a very mechanical manner in fixing a re-mention date. This was not a healthy judicial phenomenon and temperament. Magistrates should resist from such temptations, however busy and pressured they may be in carrying out their duties for the day. (paras 3 & 5)

(2) In deciding whether to transmit the case to the High Court, the magistrate should not be concerned with the chemist report. It was for the police and the public prosecutor to put their act together when charging an accused, after the police have completed their investigations, pursuant to any remand under s. 117 CPC. If the chemist report was not available to the police, how could the accused have been charged, in the first place, for an offence under the DDA without knowing the nature of the substance in his possession. The accused ought to have been released under s. 29 CPC. (para 6)

(3) It was an abuse of the process of the law for the police/public prosecutor to frame a charge in the magistrate's court under s. 39B(1) DDA and then detain the accused in custody at the

A 'prosecution's pleasure' without transmitting the case to the High Court for trial, immediately after the accused was produced before a magistrate and the charge read and explained to him, in accordance with s. 41A DDA. Such detention at the 'pleasure of the prosecution' was unlawful
B and could expose the government to a civil suit for damages. (para 7)

(4) The warrant of remand issued on 30 November 2006 was set aside and the mention date 22 January 2007 for the accused
C to appear before the magistrate was also set aside. The Timbalan Pendaftar was directed to return the original record of proceedings to the magistrate. The accused to be produced forthwith before the magistrate and the magistrate directed to re-consider whether to transmit the case to the High Court,
D pursuant to s. 41A DDA or to discharge the accused and release him under s. 29 CPC, after hearing submissions, if any, from the DPP and the accused. (paras 8 & 9)

(5) The provisions of s. 259 CPC were not applicable and could not be invoked, when an accused was produced before a
E magistrate upon a charge triable exclusively in the High Court, as the said proceedings for transmission under s. 41A DDA were neither an inquiry nor trial falling within the contemplation of s. 259 CPC. (para 10)

F *[Order accordingly.]*

Legislation referred to:
Criminal Procedure Code, ss. 29, 117, 259, 323
Dangerous Drugs Act 1952, ss. 39B(1), 41A

G *For the prosecution - Azar Irwan DPP*

Reported by Suhainah Wahiduddin

H **JUDGMENT**

KN Segara J:

[1] The record of proceedings before the magistrate Shah Alam on 30 November 2006 was called and examined, pursuant to
I s. 323 CPC, upon my attention being drawn to a newspaper report dated 1 December 2006, regarding an offence of trafficking in dangerous drugs, allegedly committed by the accused.

[2] When the accused was first produced before the magistrate on 30 November 2006, no plea was recorded by the magistrate in respect of the charge under s. 39B(1) of the Dangerous Drugs Act 1952 (DDA), for the alleged offence of trafficking in 1980 gm of ganja on 20 November 2006. However, the magistrate also did not transmit the case to the High Court and cause the accused person to appear or brought before the High Court, as clearly provided for under s. 41A DDA. Instead, the magistrate fixed the case for mention again, in the magistrate's court, on 22 January 2007.

Section 41A DDA reads:

> (1) **Where any case** in respect of **an offence** under the Act **is triable exclusively by the High Court** or is required by the Public Prosecutor to be tried by the High Court, **the accused person shall be produced before the appropriate subordinate court which shall,** after the charge has been explained to him, **transmit the case to the High Court** without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, **and cause the accused person to appear or be brought before the Court as soon as may be practicable.**
>
> (2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
>
> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial,
>
> (4) **The provisions of subsections (1),** (2) and (3) **shall have effect notwithstanding any other written law to the contrary** (emphasis added)

[3] Upon examining the original record of proceedings of the magistrate, it is rather disappointing, to say the least, that the magistrate had hardly made any relevant record in clear terms, to justify, in law, the re-mention of the case before her on 22 January 2007 and thereby order the accused to be remanded in custody for a period of two months, from his date of his arrest.

[4] The very brief notation by the magistrate, in the column for the reason for adjournment, on the first page of the charge sheet, after the date 22 January 2007 is as follows:

> Sebutan untuk mendapatkan Lapuran Kimia

[5] The record of proceedings do not show that there was any request from the DPP Samihah Ghazali not to transmit the case to the High Court because the chemist report was not available. The magistrate appears to have acted in a very mechanical manner in fixing a re-mention date. This is not a healthy judicial phenomenon and temperament. Magistrates should resist from such temptations, however busy and pressured they may be in carrying out their duties for the day. The charge sheet does not appear to even carry a signature of the DPP or police officer who framed the charge!

[6] In deciding whether to transmit the case to the High Court, the magistrate should not be concerned with the chemist report. It is for the police and the Public Prosecutor to put their act together when charging an accused, after the police have completed their investigations, pursuant to any remand under s. 117 CPC. If the chemist report was not available to the police, how could the accused have been charged, in the first place, for an offence under the DDA, without knowing the nature of the substance in his possession? The accused ought to have been released under s. 29 CPC.

Section 29 CPC reads:

> No person who has been arrested by a police officer shall be released except on his own bond or on bail or under the order in writing of a Magistrate or of a police officer not below the rank of Inspector.

[7] It is clearly an abuse of the process of the law for the police/Public Prosecutor to frame a charge, in the magistrate's court under s. 39B(1) DDA, and then detain the accused in custody at the "prosecution's pleasure", without transmitting the case to the High Court for trial, immediately after the accused is produced before a magistrate and the charge read and explained to him, in accordance with s. 41A DDA. Such detention at the "pleasure of the prosecution" is unlawful and could expose the Government to a civil suit for damages.

[8] The warrant of remand issued on 30 November 2006 is set aside and the mention date 22 January 2007 for the accused to appear before the magistrate is also set aside. The Timbalan Pendaftar is directed to return the original record of proceedings to the magistrate.

[9] The accused is to be produced forthwith before the magistrate and the magistrate directed to re-consider whether to transmit the case to the High Court, pursuant to s. 41A DDA or to discharge the accused and release him under s. 29 CPC, after hearing submissions, if any, from the DPP and the accused.

[10] I wish to make it very clear that the provisions of s. 259 CPC are not applicable and cannot be invoked, when an accused is produced before a magistrate upon a charge triable exclusively in the High Court, as the said proceedings for transmission under s. 41A DDA are neither an inquiry nor trial falling within the contemplation of s. 259 CPC.

Section 259 CPC reads:

> (i) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, be order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused if in custody: provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding eight days at a time: provided further that where a Government Medical Officer had certified that a complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.
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> (ii) Every order made under this section by the Court of a Magistrate shall be in writing, signed by the presiding Magistrate, and shall state the reasons therefore.